SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 442

ARON ROSENSWEIG AND ABE ROSENSWEIG,
Petitioners,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

A.

The decision of the United States Circuit Court of Appeals for the Ninth Circuit has not yet appeared in the Federal Reporter. It is to be found in the record (R. 125-134).

B.

The judgment of the Circuit Court of Appeals for the Ninth Circuit sought to be reviewed here was entered on June 30, 1944. Petition for rehearing was denied by said Circuit Court of Appeals on August 2, 1944.

C.

Statement of Facts.

Petitioners were convicted in the District Court of the Southern District of California under Count I of the Information which charged that they

> "* * * did knowingly, wilfully and unlawfully offer for sale, sell and deliver to E. E. Surhart * * * one side of U. S. Grade A beef weighing 296 pounds for the sum of $88.91, which side of U. S. Grade A beef weighing 296 pounds sold at a maximum price of $68.12 under the provisions of Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381 as amended, * * *" (R. 4).

From this judgment they appealed to the Circuit Court of Appeals for the Ninth Circuit (R. 22-31). The Circuit Court of Appeals affirmed the judgment of the District Court (R. 137).

Other facts are stated in the Petition for Certiorari, beginning on page 2, under the Caption "Statement of the Case."

D.

Assignments of Error.

The Court below erred:

(1) In holding that Section 204(d) of the Emergency Price Control Act of 1942 as amended (50 U. S. C. A. App. Section 924(d)) precluded petitioners by way of defense to the offense charged in Count I of the Information herein from challenging the enforcibility of Revised Maximum Price Regulation No. 169 (7 Fed. Reg. 10381) which, as to agricultural commodities, is void on its face.

(2) In holding that neither the Court below nor the District Court had jurisdiction to consider the enforcibility of Revised Maximum Price Regulation No. 169 (7 Fed. Reg.

10381, under the facts of this case, because of the provisions of Section 204(d) of the Emergency Price Control Act of 1942 as amended (50 U. S. C. A. App. Section 924(d)).

E.

Summary of Argument.

The Circuit Court of Appeals for the Ninth Circuit erroneously held that it could not consider petitioners' claim that Revised Maximum Price Regulation No. 169 was not enforcible against them, under the facts of the case, because said Regulation had not been approved by the Secretary of Agriculture as required by Section 3(e) of the Emergency Price Control Act. Said Regulation is void on its face as to agricultural commodities, because not so approved. This Court, in the case of *Yakus* v. *United States*, — U. S. —, 88 L. Ed. (Adv. Op.) 653, expressly reserved for future decision the question whether one charged with the criminal violation of a price regulation may defend on the ground that the regulation is unconstitutional, or void, on its face (88 L. Ed. 672). Since it is well settled that a statute, which is unconstitutional, or void, on its face, is not enforcible and may be utterly disregarded, it follows that a mere administrative regulation or order which is unconstitutional, or void, on its face is likewise not enforcible. The violation of a void administrative regulation or order does not constitute an offense against the United States, or the laws thereof.

F.

Argument.

(a)

The Information Does Not Charge an Offense.

The offense alleged in Count I of the Information (the only Count here involved) was the sale by petitioners of a

side of beef weighing 296 pounds at a price above the maximum price fixed by Revised Maximum Price Regulation No. 169 (R. 4). A side of beef is not a processed product. (See *Commonwealth* v. *Clark*, 344 Pa. 155, 25 A. (2d) 143; *Florida Packing & Ice Co.* v. *Carney*, 51 Fla. 190, 41 So. 190, 192; *Kennedy* v. *State Board*, 224 Iowa 405, 276 N. W. 205, 206.) A side of beef is a beef carcass. (See Section 1364.477 of Revised Maximum Price Regulation No. 169.) A beef carcass is an agricultural commodity. (See cases cited, *supra*.)

Revised Maximum Price Regulation No. 169 was not approved by the Secretary of Agriculture, as required by Section 3(e) of the Emergency Price Control Act, hence said Regulation never became effective as to agricultural commodities. Section 3(e) of the Act provides:

> "Notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any other person with respect to any agricultural commodity *without the prior* approval of the Secretary of Agriculture * * *." (Italics ours.)

The power, functions and duties thus conferred on the Secretary of Agriculture were, by Executive Order No. 9328 (8 Fed. Reg. 4681), transferred to the War Food Administrator, to be thereafter exercised by him.

Revised Maximum Price Regulation No. 169, as published in the Federal Register shows on its face that it was not approved by the Secretary of Agriculture or by the War Food Administrator. Moreover, it affirmatively appears from the official proceedings of the Special Subcommittee of the House Committee on Agriculture that said Regulation was not approved by either of said officials, as required by Section 3(e) of the Act. (See Hearings

before Special Subcommittee of the House Committee on Agriculture, October 28, 1943: Specifically, the testimony of Richard B. Gilbert, Chief Economist of the Office of Price Administration.)

Regulation No. 169 Was Not Duly Promulgated.

It is manifest that the Price Administrator cannot lawfully promulgate a Regulation affecting agricultural commodities without the prior approval of the Secretary of Agriculture or the War Food Administrator. Section 3(e) of the Act, *supra*, so provides.

It should be noted that Regulation No. 169 is an act of administrative legislation, purported to be issued under a specific delegation of legislative power by the Congress to the Price Administrator *and* the Secretary of Agriculture insofar as agricultural commodities are concerned. The Regulation is analogous to an Act of Congress in certain material respects. It cannot be questioned that if a Bill is passed by the House of Representatives but is not passed by the Senate it never becomes law. Joint action or approval by both branches of the Congress is necessary to duly enact Congressional legislation. A like requirement is provided by Section 3(e) of the Act for the due promulgation of Price Regulations affecting agricultural commodities. That requirement is mandatory. Failure to comply with it, as to agricultural commodities, makes such regulations void and unenforcible. Since Regulation No. 169 was not approved, as required by Section 3(e) of the Act, it was not duly promulgated as to agricultural commodities and, therefore, is not enforcible against petitioners herein.

(b)

Petitioners Are Not Precluded by Section 204(d) of the Act from Challenging the Enforcibility of Regulation No. 169.

The court below held that petitioners' claim, that Revised Maximum Price Regulation No. 169 is not enforcible against them, is no more than a claim that the Regulation is invalid, and that such a claim could not be considered because of this Court's decision in *Yakus* v. *United States*, — U. S. —, 88 L. Ed. (Adv. Op.) 653. (See R. 131.) This holding of the court below amounts, in substance, to deciding that a Regulation void on its face must be enforced in a criminal prosecution for a violation thereof and that the trial court is without jurisdiction, right, or power to consider such invalidity as a defense in such prosecution. This, we believe, is an incorrect interpretation of this Court's decision in the *Yakus* case. Moreover, in its opinion in that case this Court expressly reserved for future decision the question whether one charged in a criminal prosecution with the violation of a Price Regulation may defend on the ground that such Regulation is unconstitutional, or void, on its face. (See 88 L. Ed. 672.) The question there reserved for future decision is squarely presented herein and should now be settled by this Court.

It may be observed that if a Regulation is void on its face, there is nothing left for adjudication by recourse to the procedure prescribed by Sections 203 and 204 of the Act. It is, we think, apparent that the Congress intended that the procedure there prescribed should be followed only in cases where issues of fact, or law, or both law and fact, must be adjudicated. Such issues are wholly lacking here, and hence no such adjudication is necessary.

If the district court cannot judicially notice that a Price Regulation is void on its face, then it logically follows that a *void* Regulation must be treated, construed and enforced as valid, even to the extent of imposing criminal punishment, because its invalidity was not adjudicated under the protest procedure prescribed by Sections 203 and 204 of the Act. The effect of so holding would be to supply the approval, by the Secretary of Agriculture, of a Regulation which shows on its face that it was not approved by him; and this in turn would result in nullifying the provisions of Section 3(e) of the Act. No such absurd results could have been contemplated by the Congress in setting up the procedure prescribed by Section 204(d) of the Act, for obviously Congress would not require an adjudication of invalidity where invalidity clearly appears on the face of the Regulation and is not in issue.

It is not necessary to comply with the provisions of an administrative order which is void on its face.

It is apparent, without argument, that an administrative order cannot impose duties, obligations and penalties more binding than those imposed by a statute. It is well settled that a void statute is unenforcible and may be utterly disregarded. (See 11 Am. Jur. pp. 827, 828, Section 148; 16 C. J. S. 287, et seq., Section 101; *Norton* v. *Shelby County*, 118 U. S. 425, 442, 30 L. Ed. 178, 6 S. Ct. 1121; Ex parte Siebold, 100 U. S. 371, 376, 25 L. Ed. 717, 719; *Chicago, I. L. R. Co.* v. *Hackett*, 228 U. S. 559, 566, 57 L. Ed. 966, 969.)

The rule here applicable is stated in *11 Am. Jur.* 827, supra, as follows:

> "The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and in legal contemplation is as inoperative as if it had never been passed."

This statement of the rule is in accord with the decisions of this Court, supra. In *Chicago, I. L. R. Co.* v. *Hackett*, 228 U. S. 559, 566; 57 L. Ed. 966, 969, supra, this Court said:

> "That act was therefore as inoperative as if it had never been passed, for an unconstitutional act is not a law and can neither confer a right or immunity nor operate to supersede any existing valid law. (Citing cases.)"

Analogous and to the same general effect are: Ex parte Young, 209 U. S. 123, 146, 28 S. Ct. 441, 52 L. Ed. 714; *Stafford* v. *Wallace*, 258 U. S. 495, 42 S. Ct. 397, 400, 66 L. Ed. 735; *Terrace* v. *Thompson*, 263 U. S. 197, 215, 44 S. Ct. 15, 18, 68 L. Ed. 255; *Tyson & Brother etc. Offices* v. *Banton*, 273 U. S. 418, 428, 47 S. Ct. 426, 427, 71 L. Ed. 718; *Wallace* v. *Currin* (4 Cir.) 95 F. (2d) 856, 861.

The Regulation here challenged is not sacrosanct because issued by an administrative officer. It must be measured by the same standards that apply to statutes, and certainly can have no greater force and effect. As already stated, a statute which has been passed by only one of the two branches of Congress is utterly void, may be disregarded, and is unenforcible. Regulation No. 169, as to agricultural commodities, is in the same category, for the same reasons.

Courts cannot be required to enforce unconstitutional or void statutes or unconstitutional or void administrative orders.

Implicit in the rule that an unconstitutional or void statute is inoperative and unenforcible, as stated in the texts and decisions above cited, is the principle that the courts cannot be required to enforce such a statute. The same rule is applicable to an unconstitutional or void administrative order or regulation, and has ample support

in both reason and authority. (See 6 R. C. L. 117, 118, Section 117; 11 Am. Jur. 827, 829, Section 148; *Chicago, I. L. R. Co.* v. *Hackett*, supra; *United States* v. *Realty Co.*, 163 U. S. 427, 16 S. Ct. 1120, 41 L. Ed. 215; *Hammond* v. *Clark*, 136 Ga. 313, 71 S. E. 479; *Anderson* v. *Lehmkuhl*, 119 Neb. 451, 229 N. W. 773; *State* v. *Williams*, 146 N. C. 618, 61 S. E. 61.) The rule extends to criminal cases (Ibid.), and as to such cases is thus stated in 6 R. C. L. 119:

> "It has been decided that an offense created by an unconstitutional law is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment, and the courts must liberate a person imprisoned under it just as if there had never been the form of a trial, conviction and sentence."

See, Ex parte Siebold, supra; *State* v. *Williams*, supra; Ex parte Hollman, 79 S. C. 9, 60 S. E. 19; Ex parte Bornee, 76 W. Va. 360, 85 S. E. 529; *Kelley* v. *Meyers*, 124 Or. 322, 263 Pac. 903, 56 A. L. R. 661.

Nor can the courts make a statute valid that is invalid on its face, and this is likewise true as to an invalid administrative order or regulation.

Conclusion.

Wherefore, it is submitted that the writ of certiorari prayed for in the petition herein should be granted, and the judgment of the court below should be reversed.

Respectfully submitted,

JOHN W. PRESTON,
712 Rowan Building,
Los Angeles 13, California,
Counsel for Petitioners.

APPENDIX

APPENDIX.

EMERGENCY PRICE CONTROL ACT OF 1942.

For the convenience of the Court, Section 3 of the Act (50 U. S. C. A. App. Section 903) is set out in full as follows:

"Sec. 3. (a) No maximum price shall be established or maintained for any agricultural commodity below the highest of any of the following prices, as determined and published by the Secretary of Agriculture: (1) 110 per centum of the parity price for such commodity, adjusted by the Secretary of Agriculture for grade, location and seasonal differentials, or, in case a comparable price has been determined for such commodity under subsection (b), 110 per centum of such comparable price, adjusted in the same manner, in lieu of 110 per centum of the parity price so adjusted; (2) the market price prevailing for such commodity on October 1, 1941; (3) the market price prevailing for such commodity on December 15, 1941; or (4) the average price for such commodity during the period July 1, 1919, to June 30, 1929.

(b) For the purposes of this Act, parity prices shall be determined and published by the Secretary of Agriculture as authorized by law. In the case of any agricultural commodity other than the basic crops corn, wheat, cotton, rice, tobacco, and peanuts, the Secretary shall determine and publish a comparable price whenever he finds, after investigation and public hearing, that the production and consumption of such commodity has so changed in extent or character since the base period as to result in a price out of line with parity prices for basic commodities.

(c) No maximum price shall be established or maintained for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to producers of such agricultural commodity a price for such agricultural commodity equal to the highest price therefor specified in subsection (a).

(d) Nothing contained in this Act shall be construed to modify, repeal, supersede, or affect the provisions of the Agricultural Marketing Agreement Act of 1937, as amended, or to invalidate any marketing agreement, license, or order, or any provision thereof or amendment thereto, heretofore or hereafter made or issued under the provisions of such Act.

(e) Notwithstanding any other provisions of this or any other law, no action shall be taken under this Act by the Administrator or any other person with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture; except that the Administrator may take such action as may be necessary under section 202 and section 205 (a) and (b) to enforce compliance with any regulation, order, price schedule or other requirement with respect to an agricultural commodity which has been previously approved by the Secretary of Agriculture.

(f) No provision of this Act or of any existing law shall be construed to authorize any action contrary to the provisions and purposes of this section."

REVISED MAXIMUM PRICE REGULATION No. 169.

For the convenience of the Court, Section 1364.455(a) (8) and (9) and Section 1364.477 (3) of Revised Maximum Price Regulation No. 169, as in effect at the date of the offense alleged in the Information, are set out in full as follows:

"Sec. 1364.455. *Definitions applicable to beef.* (a) When used in this Revised Maximum Price Regulation No. 169 and when applicable to beef, the term: (Subsections (1) to (7) omitted).

"(8) 'Beef carcass' means and is limited to the dressed carcass, side, or sides of beef, which shall be dressed with the 1st and 2nd tail (caudal) vertebrae, kidney knob or knobs and hanging tender left on. The beef carcass shall not be broken in any other manner than provided in paragraph (a) (9) of this Sec. 1364.455.

"(9) 'Beef wholesale cut' means and is limited to any of the following cuts meeting the following minimum specifications, derived from the beef carcass, but excluding the offal and any item not included herein. (All measurements prescribed herein shall be made with a rigid straight ruler. All cuts shall be made according to the definite guides and measurements specified. Ribs are designated as 1st to 13th, inclusive, counting as the 1st rib that one which is nearest the neck end of the side.)

"Sec. 1364.477. *Definitions applicable to processed products.* (a) When used in this Revised Maximum Price Regulation No. 169 and when applicable to processed products the term: (Subsections (1) and (2) omitted.)

"(3) 'Processed products' means ground, cured, pickled, spiced, smoked, dried or otherwise processed beef and/or veal, including ground hamburger and sausage containing any proportion of beef or veal: *Provided,* That any beef carcass, or cut thereof, including any beef wholesale cut which has been boned as permitted in subpart B of this Revised Regulation or otherwise, or any veal carcass, or cut thereof, including any veal wholesale cut which has been boned as permitted in subpart C of this Revised Regulation or otherwise shall not be deemed a processed product. Products of each grade and brand, and in each stage of processing, shall be considered separate processed products. Each type of canned and packaged meat, made entirely from beef and/or veal shall be considered a separate processed product. Kosher processed products shall for the purposes of Sec. 1364.476 be regarded as separate processed products."